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**From:** Fleck, Diane (LA user)  
**Sent:** Wednesday, September 9, 2020 2:10 PM  
**To:** Joseph Dillon NOAA Federal  
**Subject:** FW: FW: ESA Consultation CA Se Proposed Rule

Hi Joe,  
Hope you are doing well and staying safe!

[illegible]

Thanks! Hope to hear from you soon, and I hope all is well with you and your family. My direct cell is 415 706-4776.  
Diane


*Diane E. Fleck, P.E., Esq.*  
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600 Wilshire Blvd., Suite 940  
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**From:** Fleck, Diane (LA user)  
**Sent:** Tuesday, September 1, 2020 10:32 AM  
**To:** Joseph Dillon - NOAA Federal <joseph.j.dillon@noaa.gov>  
**Cc:** Yin, Christina <Yin.Christina@epa.gov>  
**Subject:** RE: FW: ESA Consultation CA Se Proposed Rule

Hi Joe,  
Hope you and your family are all doing well!

We have a technical assistance question for you, regarding the ESA consultation for our promulgation of a freshwater selenium water quality criterion for California. Our action area includes freshwaters and estuarine waters (excluding the San Francisco Bay and Delta) with salinity below 10 ppt in California.

In [REDACTED]  
[REDACTED]  
[REDACTED]  
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[REDACTED]  
[REDACTED]  
[REDACTED] [REDACTED]  
[REDACTED]



Thanks and hope to hear from you soon. Stay safe!  
Diane

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**From:** Joseph Dillon - NOAA Federal <[joseph.j.dillon@noaa.gov](mailto:joseph.j.dillon@noaa.gov)>  
**Sent:** Thursday, June 11, 2020 1:13 PM  
**To:** Fleck, Diane (LA user) <[Fleck.Diane@epa.gov](mailto:Fleck.Diane@epa.gov)>  
**Cc:** Yin, Christina <[Yin.Christina@epa.gov](mailto:Yin.Christina@epa.gov)>  
**Subject:** Re: FW: ESA Consultation CA Se Proposed Rule

Hi Diane - Thank you for the inquiry. I just checked, and yes, the list you presented is still correct.

I hope this email finds you and your loved ones well too!

Thanks,  
Joe

On Mon, Jun 1, 2020 at 4:11 PM Fleck, Diane (LA user) <[Fleck.Diane@epa.gov](mailto:Fleck.Diane@epa.gov)> wrote:

Hi Joe,  
I hope you and your family are all safe and doing well!

This is a follow-up request to our correspondence from last fall, in which we requested your confirmation of the ESA listed species under NMFS jurisdiction, and Essential Fish Habitat, for the ESA consultation of our proposed selenium water quality criterion for California (excluding San Francisco Bay and Delta). Our original letter is attached, and your response and our follow-up discussion concerning listed turtles and the killer whale is below.

The ESA regulations at 50 CFR part 402.12(e) require us to verify the current accuracy of a species list for a specific consultation, if we do not begin preparation of the biological assessment/ biological evaluation with 90 days of receipt of or concurrence with the species list. Since it has been a few months since we last discussed the list, we are requesting your verification of the list. We understand it to be the following (corrected per e-mails below):

**Sacramento River winter-run Chinook salmon ESU (*Oncorhynchus tshawytscha*)**  
endangered (June 28, 2005, 70 FR 37160); critical habitat (June 16, 1993, 58 FR 33212)

**Central Valley spring-run Chinook salmon ESU (*Oncorhynchus tshawytscha*)**  
threatened (June 28, 2005, 70 FR 37160); critical habitat (September 2, 2005, 70 FR 52488)

**California Coastal Chinook salmon ESU (*Oncorhynchus tshawytscha*)**  
threatened (June 28, 2005, 70 FR 37160); critical habitat (September 2, 2005, 70 FR 52488)

**Southern California steelhead DPS (*Oncorhynchus mykiss*)**

endangered (January 5, 2006, 71 FR 834); critical habitat (September 2, 2005, 70 FR 52630)

**California Central Valley steelhead DPS (*Oncorhynchus mykiss*)**

threatened (January 5, 2006, 70 FR 37160); critical habitat (September 2, 2005, 70 FR 52630)

**Northern California Coast steelhead DPS (*Oncorhynchus mykiss*)**

threatened (January 5, 2006, 70 FR 37160); critical habitat (September 2, 2005, 70 FR 52630)

**Central California Coast steelhead DPS (*Oncorhynchus mykiss*)**

threatened (January 5, 2006, 70 FR 37160); critical habitat (September 2, 2005, 70 FR 52630)

**South-Central California Coast steelhead DPS (*Oncorhynchus mykiss*)**

threatened (January 5, 2006, 70 FR 37160); critical habitat (September 2, 2005, 70 FR 52630)

**Southern Oregon/Northern California Coast coho salmon ESU (*Oncorhynchus kisutch*)**

threatened (June 28, 2005, 70 FR 37160); critical habitat (May 5, 1999, 64 FR 24049)

**Central California Coast coho salmon ESU (*Oncorhynchus kisutch*)**

endangered (June 28, 2005, 70 FR 37160); critical habitat (May 5, 1999, 64 FR 24049)

**Southern DPS of North American green sturgeon (*Acipenser medirostris*)**

threatened (April 7, 2006, 71 FR 17757); critical habitat (October 9, 2009, 74 FR 52300)

**Pacific eulachon/smelt southern DPS (*Thaleichthys pacificus*)**

threatened (March 18, 2010, 75 FR 13012); critical habitat (October 20, 2011, 76 FR 65324)

**Southern Resident killer whale (*Orcinus orca*)**

endangered (November 18, 2005, 70 FR 69903); critical habitat (November 29, 2006, 71 FR 69054)

**Green sea turtle (*Chelonia mydas*); threatened (July 28, 1978, 43 FR 32800)**

Please let us know at if this list is still correct, or whether changes are needed. I just left you a voice mail as well, and hope to talk with you soon.

Diane

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**From:** Joseph Dillon - NOAA Federal <[joseph.j.dillon@noaa.gov](mailto:joseph.j.dillon@noaa.gov)>

**Sent:** Wednesday, September 25, 2019 11:09 AM

**To:** Fleck, Diane (LA user) <[Fleck.Diane@epa.gov](mailto:Fleck.Diane@epa.gov)>

**Cc:** Fleming, Terrence <[Fleming.Terrence@epa.gov](mailto:Fleming.Terrence@epa.gov)>

**Subject:** Re: ESA Consultation CA Se Proposed Rule

Hi Diane - you are absolutely correct. I think I just made a cut and paste error from the master list of species listing info that I have. Neither loggerheads or leatherbacks are found in the action area for your project and do not need to be evaluated.

Apologies for the error, and thank you for contacting me to clarify,

Joe

On Tue, Sep 10, 2019 at 10:38 AM Fleck, Diane (LA user) <[Fleck.Diane@epa.gov](mailto:Fleck.Diane@epa.gov)> wrote:

Hi Joe,

I was comparing the list we sent vs. the list you sent back. We did not have the Loggerhead sea turtle on our original list (only the Green & Leatherback sea turtles). Your list included both the Green and the Loggerheads (below), and specifically noted that we should include the Greens and exclude the Leatherbacks, but you didn't say anything about the Loggerheads. It looks like they do not live anywhere near the CA coast. The NOAA website says the North Pacific Ocean DPS of Loggerheads is endangered but doesn't live anywhere near our action area. The website says:

In the Pacific, there are two distinct population segments (DPS) of loggerheads. The North Pacific Loggerhead Turtle DPS nests only on the coasts of Japan. This population has declined 50 to 90 percent during the last 60 years, however the overall nesting trend in Japan has been stable or increasing over the last decade. The South Pacific loggerhead turtle DPS nests primarily in Australia with some nesting in New Caledonia. In 1977 about 3,500 females may have nested in the South Pacific —today there are only around 500 per year.

<https://www.fisheries.noaa.gov/species/loggerhead-turtle>

I'm thinking they should be deleted from your list; pls let us know.

I've added the orcas (southern resident killer whales) to our list (interesting!) Hope your fieldwork is going smoothly,

Thanks,  
Diane

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**From:** Joseph Dillon - NOAA Federal <[joseph.j.dillon@noaa.gov](mailto:joseph.j.dillon@noaa.gov)>

**Sent:** Thursday, September 5, 2019 12:22 PM

**To:** Fleck, Diane (LA user) <[Fleck.Diane@epa.gov](mailto:Fleck.Diane@epa.gov)>

**Cc:** Fleming, Terrence <[Fleming.Terrence@epa.gov](mailto:Fleming.Terrence@epa.gov)>

**Subject:** Re: ESA Consultation CA Se Proposed Rule

Hi Diane,

Apologies for the delay in response. I'm traveling for work again with field days in-between.

I checked with our sea turtle expert on your list. Green sea turtles have been documented regularly using the

lower San Gabriel river near the power plant facility there, as well as being in San Diego Bay (although I do not think San Diego Bay meets your salinity criteria). The San Gabriel River site likely meets your freshwater/1 ppt criterion at least during the rainy season. So it makes sense to include them. Leatherback sea turtles can be removed from the list though. They are a strictly marine species in the action area, unless you have some information that we do not have.

Please note that Southern Resident Killer Whales have been added to your species list. Given that the main component of their diet is salmonids (particularly chinook salmon species), we consider them whenever there is a project that may effect salmonids. If EPA determines that there is not likely to be an adverse effect to salmonids from the action, then a not likely determination could logically follow for the Southern residents. If EPA determines that the action may affect salmonids, you will have to consider the level of impact to the fish and then make a determination if that would affect the Southern resident killer whales in turn. We can discuss this as needed.

Essential Fish Habitat (EFH) for your action, as described on 8-29-2019, would be likely be restricted to Chinook and coho salmon because of their extensive utilization of some freshwater habitats. They are managed under the Pacific Salmon Fishery Management Plan (FMP). Habitat Areas of Particular Concern (HAPC) under the EFH regulations for this FMP include spawning areas, floodplains, etc. Please see page 16 of this document for a listing of the HAPC:

(<https://static1.squarespace.com/static/511cdc7fe4b00307a2628ac6/t/573a07797c65e405531b0c4d/1463421123630/HAPC-Supplemental.pdf>). A HAPC designation means we are supposed to scrutinize any actions there more thoroughly but in this case the salmon are ESA listed and we'll be doing that anyway! Since the San Francisco Bay Delta is not part of the action, other types of EFH (Coastal Pelagics and Pacific Groundfish Fishery Management Plans) are not included.

ESA listed species under NMFS jurisdiction for your described action and action area:

**Sacramento River winter-run Chinook salmon ESU (*Oncorhynchus tshawytscha*)**

endangered (June 28, 2005, 70 FR 37160)

critical habitat (June 16, 1993, 58 FR 33212)

**Central Valley spring-run Chinook salmon ESU (*Oncorhynchus tshawytscha*)**

threatened (June 28, 2005, 70 FR 37160)

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**California Coastal Chinook salmon ESU (*Oncorhynchus tshawytscha*)**

threatened (June 28, 2005, 70 FR 37160)

critical habitat (September 2, 2005, 70 FR 52488)

**Southern California steelhead DPS (*Oncorhynchus mykiss*)**

endangered (January 5, 2006, 71 FR 834)

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critical habitat (September 2, 2005, 70 FR 52630)

**South-Central California Coast steelhead DPS (*Oncorhynchus mykiss*)**

threatened (January 5, 2006, 70 FR 37160)

critical habitat (September 2, 2005, 70 FR 52630)  
**Southern Oregon/Northern California Coast coho salmon ESU** (*Oncorhynchus kisutch*)  
threatened (June 28, 2005, 70 FR 37160)  
critical habitat (May 5, 1999, 64 FR 24049)  
**Central California Coast coho salmon ESU** (*Oncorhynchus kisutch*)  
endangered (June 28, 2005, 70 FR 37160)  
critical habitat (May 5, 1999, 64 FR 24049)  
**Southern DPS of North American green sturgeon** (*Acipenser medirostris*)  
threatened (April 7, 2006, 71 FR 17757)  
critical habitat (October 9, 2009, 74 FR 52300)  
**Pacific eulachon/smelt southern DPS** (*Thaleichthys pacificus*)  
threatened (March 18, 2010, 75 FR 13012)  
critical habitat (October 20, 2011, 76 FR 65324)  
**Southern Resident killer whale** (*Orcinus orca*)  
endangered (November 18, 2005, 70 FR 69903)  
critical habitat (November 29, 2006, 71 FR 69054)  
**Loggerhead sea turtle** (*Caretta caretta*)  
threatened (July 28, 1978, 43 FR 32800)  
**Green sea turtle** (*Chelonia mydas*)  
threatened (July 28, 1978, 43 FR 32800)

I do not have a list of key information to provide you at this time and do not have time to conduct a literature search right now. Given the years of coordination our agencies have on this topic, I expect you have everything I may already have anyway. Tom M. from the USFWS mentioned that SFEI (Jay Davis' group) was generating data on sturgeon and selenium. I have not looked at the available information recently, or requested other information, at this time from SFEI.

My schedule will remain very busy with field work and travel until near the end of October, unless early rains end the season prematurely. If you need to reach me, please email and I will work to find the time to touch bases.

I hope SoCal is treating you well,

Joe

On Mon, Aug 12, 2019 at 5:03 PM Fleck, Diane (LA user) <[Fleck.Diane@epa.gov](mailto:Fleck.Diane@epa.gov)> wrote:

Hi Joe,

Attached is a letter requesting verification of the NMFS species & habitat list for the ESA consultation on our California selenium water quality criterion proposal, to initiate informal consultation. We also request a list of essential fish habitat, as well as identification of any key information for our biological evaluation to help us find (up front) all the important documents for our review. We can discuss the letter's requests during our August 29<sup>th</sup> conference call.

The original is in the mail to you. Thanks, and talk to you soon.

Diane

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